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Supreme Court, U.S.
FILED
AUG 9 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1971

No. 70-187

PATTIE BLACK COTTON, *et al.*,
Petitioners,

v.

SCOTLAND NECK CITY BOARD OF EDUCATION, *et al.*

No. 70-188

PECOLA ANNETTE WRIGHT, *et al.*,
Petitioners,

v.

COUNCIL OF THE CITY OF EMPORIA, *et al.*

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Counsel for petitioners in each of these cases, presently pending upon petitions for writs of certiorari, file this joint Supplemental Brief pursuant to Rule 24(5) of this Court. Significant decisions of federal and state courts have been rendered since the filing of the petitions for writs of certiorari, each of which underscores the importance and desirability of granting review in these cases.

The three pending matters referred to in footnote 10 at page 17 of the petition in No. 70-188 have been decided. In each instance, a rule contrary to that announced by the

United States Court of Appeals for the Fourth Circuit in these cases has been applied, to reach results opposite to those permitted by the decisions of which review is sought.

In *Lee* v. *Macon County Board of Education*, No. 30154 (5th Cir. June 29, 1971) (reprinted as Appendix A, pp. 1a-21a), the Court of Appeals for the Fifth Circuit required that a newly established separate city school district in Oxford, Alabama be treated, for purposes of relief in the pending school desegregation case, as part of the county system from which it was excised. The court explicitly eschewed deciding the matter on the basis of subjective intent, but instead emphasized the effect upon desegregation of the entire area if the new system had to be treated as a separate entity:

> The city cannot secede from the county where the effect—to say nothing of the purpose—of the secession has a substantial adverse effect on desegregation of the county school district. (11a)

Prior to the re-creation of a separate city school district in Oxford, white students from the county had crossed city boundaries to attend white schools in Oxford while black students from Oxford had attended the county training school outside the City limits (3a)—just as was true of Emporia and Greensville County (Petition in No. 70-188, p. 64a) and Scotland Neck and Halifax County (Petition in No. 70-187, p. 3). The Court of Appeals for the Fifth Circuit adopted a simple, clear and effective rule to ensure that the constitutional rights sought to be enforced by plaintiffs in school desegregation actions would not be frustrated by mid-litigation creation of new entities; at the same time, the Court of Appeals was solicitous of the State's interest in maintaining its control over its political organization:

> It is unnecessary to decide whether long established and racially untainted boundaries may be disregarded in dismantling school segregation. *New* boundaries cannot be drawn where they would result in less desegregation when formerly the lack of a boundary was instrumental in promoting segregation. *Cf. Henry* v. *Clarksdale Municipal Separate School District*, 5 Cir. 1969, 409 F.2d 683, 688, n. 10 [cert. denied, 396 U.S. 940 (1969)]. (11a-12a) (emphasis in original)

Similarly, in *Stout* v. *Jefferson County Board of Education*, Nos. 29886 and 30387 (5th Cir., July 16, 1971) (reprinted as Appendix B, pp. 22a-24a), another Fifth Circuit panel, citing the *Lee* v. *Macon County* decision and this Court's ruling in *North Carolina State Board of Education* v. *Swann*, —— U.S. ——, 28 L.Ed.2d 588, 589 (1971), directed that newly formed school districts be ignored in the development and implementation of an adequate desegregation plan on remand (24a):

> Likewise, where the formulation of splinter school districts, albeit validly created under state law, have the effect[2] of thwarting the implementation of a unitary school system, the district court may not, consistent with the teachings of *Swann* v. *Charlotte-Mecklenburg, supra*, recognize their creation.[3]

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[2] The process of desegregation shall not be swayed by innocent action which results in prolonging an unconstitutional dual school system. The existence of unconstitutional discrimination is not to be determined solely by intent. *Cooper* v. *Aaron*, 358 U.S. 1 (1958); *Bush* v. *Orleans Parish School Board*, 190 F. Supp. 861 (E.D. La. 1960), aff'd *sub nom.*, *City of New Orleans* v. *Bush*, 333 U.S. 212 (1961); *United States* v. *Texas*, —— F. Supp. ——, Part II (E.D. Tex. 1971), aff'd as modified, *United States* v. *Texas*, —— F.2d —— (5th Cir., No. 71-1061, July 9, 1971).

[3] See, *Lee, et al.* v. *Macon County Board of Education*, —— F.2d —— (5th Cir. 1971) [No. 30154, June 29, 1971, Part II].

Jenkins v. Township of Morris School District, No. A-117 (Sup. Ct. N.J., June 25, 1971) (reprinted as Appendix C pp. 25a-53a) dealt with the power of the State Commissioner of Education, in carrying out the federal and state policies guaranteeing equal educational opportunity, to prohibit the withdrawal by a township of its high school students from the town educational system. The commissioner found that creation of a separate township high school system and withdrawal of its students, largely white, from the town high school, whose student body was becoming increasingly black, would have "adverse educational impact . . . in the light of the growing racial imbalance between the entire student populations of the town and the township" but concluded that state law did not give him the power to cross district lines. The Supreme Court of New Jersey rejected that view and ordered the commissioner not only to prevent withdrawal, but to consider merger on a 12-grade basis, because of the *effect* which could be anticipated even if separate elementary systems only were maintained:

> The projections leave little room for doubt as to the unfortunate future if suitable action is not taken in timely fashion. The commissioner explicitly referred to the growing racial imbalance between the town and the township and to its long range harmful *effects* on the school systems of both; and he recognized that unless forestalled there would be another urban-suburban split between black and white students. (50a) (emphasis supplied)

The New Jersey court emphasized (in connection with its discussion of the vote against consolidation in a nonbinding township referendum) that intent was not the standard upon which judgment was to be based:

> It has been suggested that it was motivated by constitutionally impermissible racial opposition to merger

> (*cf. Lee* v. *Nyquist, supra,* 318 F. Supp. 710; *West Morris Regional Board of Education* v. *Sills,* —— N.J. —— (1971)), but we pass that by since the commissioner made no finding to that effect and *his powers were, of course, in no wise dependent on any such finding.* (53a) (emphasis supplied)

Petitioners submit that these rulings by another United States Court of Appeals and a State Supreme Court apply to the resolution of problems identical to those presented in these two cases, standards which are directly contradictory to the standards announced by the Fourth Circuit. These new rulings, however, are completely consonant with the Eighth Circuit's decision in the *Burleson* case, 432 F.2d 1356 (8th Cir. 1970), *aff'g per curiam* 308 F. Supp. 352 (E.D. Ark. 1970). The sharpened conflict of decision between the Fourth, Fifth and Eighth Circuits compels resolution by this Court.

Finally, petitioners noted (Petition in No. 70-188, p. 17) that the device sanctioned below would prove an increasingly popular means of avoiding desegregation. The Fifth Circuit suggested the same thing in *Lee* v. *Macon County, supra* (11a):

> If this were legally permissible, there could be incorporated towns for every white neighborhood in every city.

This is borne out by the experience in Jefferson County, Alabama, where prior to the July 16 *Stout* decision, four new white school districts had been excised from the county. See the district court's order on remand, reprinted as Appendix D, pp. 54a-55a.

WHEREFORE, petitioners respectfully pray that writs of certiorari be granted and that the decisions below be reversed.

Respectfully submitted,

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